Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of State and	)	MM Docket No. 97-182
Local Zoning and Land Use	)	
Restrictions on the Siting,	)	
Placement and Construction	)	
of Broadcast Station	)	
Transmission Facilities	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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SUMMARY

By more than a three-to-one margin, the overwhelming majority of commenters oppose the preemption proposed in the NPRM. Support for the proposed rule was restricted to industry. Opponents of preemption, however, were a much more diverse group, including local governments, the states, several different sectors of the aviation community, private citizens and members of Congress.

The widespread opposition to the proposed rules is solidly grounded in the law and sound policy. What industry seeks is nothing short of "a single national framework for tower and broadcast facility construction." In other words, industry wants sweeping federal immunity from state and local land use laws enjoyed by no other industry, and to transform the FCC into industry's own private national zoning, land use and building code board. But preemption should be a last resort, not (as industry seems to think) the first. State and local laws are not toys to be manipulated to make up for obstacles to DTV rollout having nothing to do with those laws.

Opening comments confirm that the proposed rules are beyond the FCC's statutory authority to adopt and beyond Congress' constitutional authority to authorize the FCC to adopt. There is nothing in the Communications Act, the Telecommunications Act of 1996 or the Balanced Budget Act of 1997 even remotely suggesting that "Congress intended to overturn the Commission's [six] decade-old policy" of accommodating local land use laws

pertaining to broadcast facilities "without discussion or even suggesting [Congress] was doing so." City of New York v. FCC, 486 U.S. 57, 68 (1988). Moreover, industry comments leave no doubt that, by forcing state and local governments to absorb the financial burden of implementing a federal program and by creating a uniform national policy concerning resolution of local land use disputes, the proposed rules run afoul of the Constitution's guarantees of federalism. As other commenters pointed out, the proposed rules would also contravene federal aviation and environmental protection laws and policies.

Industry's efforts to drum up factual anecdotes to support the proposed rule serve only to highlight the grossly overreaching sweep of the rule. As an initial matter, many of industry's so-called examples have nothing to do with state and local land use and building laws. Instead, industry whines about such matters as private landowner decisions, eminent domain laws, contractor licensing laws, environmental wildlife and historical preservation laws -- as if industry wishes to convert the FCC not only into a national zoning board, but also a national contractor licensing, environmental and historic preservation, political ethics and private property review board made especially for broadcasters.

When stripped of industry's inapt and misdirected examples, what is left is a truly anecdotal record. Viewed against a universe of over 30,000 local governments and over 13,500 licensed and operating broadcast facilities nationwide,

industry's meager evidence actually points powerfully against the broad, sweeping rules proposed. Obviously sensing this problem, NAB resorts to asking the FCC to take notice of the record in other proceedings concerning satellite dishes and CMRS facilities, conveniently ignoring that none of those proceedings resulted in preemption rules even remotely as sweeping as those proposed here, and that in one of those proceedings, the FCC specifically rejected claims identical to NAB's here.

The record leaves no doubt about the effect of the proposed rule's multiple, tight "shot clock" deadlines: the total evisceration of state and local public notice and hearing requirements and a complete preemption of any meaningful review by local government of broadcaster land use or building code requests. The proposed "shot clocks" are also hypocritical, for they are far shorter and far less flexible than any deadline imposed on industry or the FCC.

Industry arguments to preempt any local consideration of aesthetic, environmental protection, wildlife and historic preservation, and similarly classic land use issues are legally and factually flawed. Federal laws in these areas are in no way preemptive; to the contrary, state and local land use and environmental laws form the backbone of our nation's effort to regulate the environmental, historical and aesthetic effects of land use. The issue is not whether environmental or aesthetic values are objective or subjective in nature; rather, the issue is whether those values will be balanced by the people through

democratically elected local governments, or by fiat through private decisions of broadcasters or through a distant, unelected federal agency with no expertise in such matters.

Comments further demonstrate that the proposed rules would threaten public safety, both in terms of the location and structural integrity of broadcast towers and in terms of aviation safety. The proposed rules also would impose substantial economic costs on the nation's airports, aviation industry and the travelling public.

The ADR provisions in the proposed rule, at least in their current form, are unconstitutional and unfairly tilted in favor of broadcasters. Unless the ADR process is made bilaterally voluntary, and unless the time constraints are expanded, it should be abandoned.

Finally, broadcasters' self-serving plea to extend the proposed rule beyond DTV is sheer bootstrap. Any "confusion" or "complexity" resulting from differential treatment of DTV and non-DTV facilities would be caused <u>not</u> by state or local governments, but by a Commission decision to preempt in this area. The FCC may not wield the awesome club of preemption merely because it is administratively convenient. Industry's position on this issue, however, reveals its true aim: to use DTV as a pretext to gain sweeping immunity from state and local laws that no other industry enjoys. The Commission should not allow itself to be used as a tool for such blatant favoritism.

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THE NATIONAL LEAGUE OF CITIES
AND THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS

The National League of Cities ("NLC") and the National Association of Telecommunications Officers and Advisors ("NATOA") submit these reply comments to the opening comments filed in response to the Notice of Proposed Rulemaking ("NPRM"), released August 19, 1997, in the above-captioned proceeding.

INTRODUCTION

The overwhelming majority of the opening comments filed in this proceeding opposed the preemption proposed in the NPRM. Indeed, opponents outnumber supporters of the proposed rule by a more than three-to-one margin.

Moreover, while support for the proposed rule was predictably restricted to the broadcast industry, the parties opposing the rule were much more diverse in nature. Opponents of the NPRM's proposed preemption include not only more than one

hundred local governments from across the nation and more than twenty of the nation's state governments, but also several different sectors of the aviation community, a host of private citizens, numerous other groups and associations, one U.S. Senator and one member of Congress. And even the broadcast industry was not unanimous in its support for the proposal, with at least one broadcaster stating that "broad preemption rules are not necessary to encourage the prompt deployment of [DTV]."[1]

The widespread opposition to the NPRM's sweeping proposed preemption is soundly based in the law and in common sense. While industry disingenuously tries to characterize the proposed rule as "limited" and "narrowly defined,"[2] industry comments leave no doubt the breathtaking sweep of the proposed rule and what industry seeks in this proceeding: a "uniform national policy regarding resolution of zoning and land use disputes" and "a single national framework for tower and broadcast facility construction." NAB Comments at ii & 9. In other words, what the industry wants is a special federal exemption from state and local land use, zoning and building laws enjoyed by no other

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[1] WFTC(TV) Comments at 2 (emphasis added). WFTC instead believes that the Commission can accomplish its objectives by modifying and more effectively enforcing the unique site rule, 47 CFR § 73.635. Id. We agree with WFTC that such an "industry-oriented approach is the best method to achieve the Commission's [DTV] goal" while, a the same time, "remaining sensitive to the rights of states and localities to protect the legitimate interests of their citizens." Id. at 6 & 10.

[2] E.g., NAB Comments at 2 & 5.

industry, and for the Commission to serve as industry's own special national zoning, land use and building code board.

Neither the Constitution or the Communications Act, however, grants the Commission such intrusive, dictatorial authority to immunize the broadcast industry in wholesale fashion from compliance with longstanding state and local police power. Moreover, even if the Commission had such authority (which it does not), the record leaves little doubt that it would be the ultimate in irrational judgment for the Commission to exercise it.

First of all, it would be a tragedy indeed for the Commission to shred the fabric of our federalism by sweeping away state and local land use building and zoning laws if, as may well be the case, the rollout of DTV is delayed by other factors that the Commission and the broadcasters themselves either cannot or will not attempt to resolve promptly.[3] It is simply wrong for the Commission and industry cavalierly to erase a whole range of state and local laws in an effort to make up time for problems occasioned by "market-oriented challenges" that state and local

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[3] See, e.g., NAB Comments at 11 (compliance with the DTV deadlines will be difficult even without state and local requirements); "MSTV To Ask FCC for DTV Changes," Broadcasting & Cable, Nov. 17, 1997 at 10 (broadcasters to ask FCC to revise DTV channel allocation plan); "Stations Ready to Spend for DTV," Broadcasting & Cable, Nov. 17, 1997 at 10 (DTV set penetration expected to be only 50% by 2007, "four-to-five-month lag reported on orders for new antennas and transmitters," and the 26 stations "that are supposed to go up in '98 [are] not all going to do it"); APTS/PBS Comments at 3 (funding request to OMB for DTV conversion of PBS stations only recently submitted); Paxson Comments at 3 (broadcasters face "variety of hurdles" to DTV).

governments did nothing to create. Paxson Comments at 3. To the contrary, preemption should be the Commission's last resort, not (as industry seems to think) its first.[4]

Second, if the Commission were improvidently to sweep aside state and local land use, building and zoning laws, the Commission would then be obligated to step into the void it created and assume responsibility for protecting the multitude of public interests those laws were intended to promote. Examples include general public safety requirements served by building code inspection and setback requirements;[5] the interests of aviation safety and efficient economic use of air transport infrastructure served by land use and zoning requirements in the vicinity of airports and elsewhere;[6] and the interests of aesthetics, compatibility of land use, residential area integrity, creating a convenient, attractive and harmonious community, and preservation of agricultural and forest lands, environmentally sensitive areas and historic areas -- all interests that have long been served by state and local land use laws.[7]

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[4] See e.g., NLC/NATOA Comments at 18-19; Philadelphia Comments at 15-17.

[5] E.g., Dallas Comments; San Francisco Comments.

[6] E.g., AOPA Comments; Michigan DOT Comments; Oregon DOT Comments; Helicopter Assn. International Comments; Airports Council International Comments; National Business Aviation Association Comments.

[7] See, e.g., Prince William County Comments at 4; Arlington & Henrico Comments at 12; Jefferson County Comments at 10; APA Comments at 1-2.

The Commission, however, lacks not only the staff and resources to take on such a variety of roles; it also lacks the necessary expertise and familiarity with unique local conditions, topography, history and structures for the thousands of affected communities across the nation. As the Airports Council International (at 3) wisely observed, local government land use authorities "represent a store of specialized knowledge and experience, based upon knowledge of local conditions . . . that no distant federal agency . . . can hope to match." Thus, unless the Commission is prepared to sacrifice the multitude of interests served by local land use, building and zoning laws for the narrow, parochial interests of the broadcast industry, it should abandon the NPRM's proposals.

I. THE RECORD CONFIRMS THAT THE COMMISSION LACKS LEGAL AUTHORITY TO ADOPT THE PROPOSED RULES.

Several commenters agreed with NLC and NATOA that the proposed rules are beyond both the Commission's authority to adopt under the Communications Act and beyond Congress' authority under the Constitution to authorize the Commission to adopt.[8] Industry commenters, in contrast, offered little or no legal justification for the proposed rules beyond that set forth in the NPRM.

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[8] See, e.g., Dallas Comments at 12-19; Philadelphia Comments at 15-36; Arlington and Henrico Comments at 2-10; Jefferson County Comments at 9; Chicago Comments at 10-20; Mass. Atty. General Comments at 2-6; CCO Comments at 35-38; San Francisco Comments.

A. Precedent Offers No Support for Industry's Claim That The FCC Has Authority To Adopt The Rule under the Communications Act.

NAB (at 3 n.2) and Childrens Broadcasting (at 6-9) assert that City of New York v. FCC, 486 U.S. 57 (1988); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); and New York State Commission on Cable v. FCC, 669 F.2d 58 (2d Cir. 1982), support the NPRM's conclusion that the Commission has legal authority to adopt the proposed rule.[9] But none of the state or local forms of regulation preempted in those cases -- local regulation of cable system technical standards in City of New York, state regulation of signals carried on cable systems in Capital Cities, and a local licensing scheme of MATV and MDS systems in New York State Cable Commission -- is even remotely comparable to the "quintessential state activity" of land use regulation[10] that the NPRM proposes to invade and destroy here. To the contrary, much as in the case of a state advertising ban upheld in Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963), that the Court distinguished in Capital Cities, 467 U.S. at 704 n.10, the Commission itself has long viewed state and local land use regulation as complementary to, not conflicting with, the

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[9] Children's Broadcasting also claims that the FCC's prior decisions and rules concerning preemption of local regulation of satellite earth stations and amateur radio antennas support the rules proposed in the NPRM. See Children's Broadcasting Comments at 8-9. We have already shown in our opening comments the defects of this argument. See NLC/NATOA Comments at 11-16.

[10] FERC v. Mississippi, 102 S. Ct. 2126, 2142 n.30 (1982).

Commission's function.[11] See NLC/NATOA Comments at 11-12 & nn. 8&9.

In fact, when properly read, City of New York v. FCC actually lends further support to our position, not the industry's. The Court there found preemption justified primarily due to Congress' longstanding pre-Cable Act acquiescence in Commission preemption of local cable technical standards and Congress' subsequent sanctioning of that preemption in the 1984 Cable Act: "We doubt that Congress intended to overturn the Commission's decade-old policy without discussion or even suggesting that it was doing so." 486 U.S. at 68.

Here, in contrast, Congress has acquiesced in the Commission's six decade-old policy of accommodating, rather than preempting, local land use and zoning laws relating to broadcast transmission facilities. NLC/NATOA Comments at 11-16. Accordingly, there simply is no basis whatsoever -- either in the Communications Act, the Telecommunications Act of 1996 or the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) -- to conclude that "Congress intended to overturn the Commission's [six] decade-old policy without discussion or even suggesting it was doing so." City of New York, 486 U.S. at 68. In fact, as we pointed out in our opening comments, Congress has consistently refused to give the Commission such sweeping

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[11] Cf. New York State Cable Commission, 669 F.2d at 66 n.16 (noting that any effort by Commission to preempt traditional local franchising of cable systems would present different issues).

authority over state and local zoning and land use laws. See NLC/NATOA Comments at 12-16.

What industry commenters fail to realize is that the Commission's authority, while perhaps broad in certain areas, "is not a license to construe statutory language in any manner whatsoever [or] to conjure up powers with no clear antecedents in statute or judicial construction." NARUC v. FCC, 533 F.2d 601, 617 (D.C. Cir. 1976). The proposed rules go far beyond "the established breadth of particular Commission powers." Id. Moreover, industry overlooks the generalized statutory presumption that "Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Applying this principle, courts have repeatedly held that generalized statutory expressions of national policy, without more, are not a sufficient basis to infer Congress' intent to preempt state and local law.[12] Yet it is just such generalized statutory expressions of policy that the NPRM relies on here; none of the statutory bases relied on by the NPRM or by industry even remotely suggests a Congressional intent to wipe away the longstanding and traditional land use and zoning powers of state and local governments. See NLC/NATOA Comments at 15-16 & n.13. Accordingly, the record makes plain that the rules proposed in

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[12] See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 222 (1983); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634 (1981); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978); NARUC v. FCC, 533 F.2d at 613 & n.77. See also Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986).

the NPRM are beyond the Commission's authority under the Communications Act.

B. The Record Supports NLC/NATOA's Contention That The Proposed Rules Are Unconstitutional.

Several commenters agreed with our argument that the proposed rules violate "the Constitution's guarantees of federalism, including the Tenth Amendment"[13] and raise serious First Amendment issues as well.[14] In addition, some commenters pointed out that the proposed rules also are vulnerable under the Takings and Due Process clauses of the Fifth Amendment and Article III of the Constitution.[15]

Industry commenters succeed only in highlighting the constitutional infirmities of the proposed rules. Thus, NAB argues that the admittedly "tight" time constraints imposed on local governments under the proposed rules are designed to force state and local governments to "concentrate their energies" on broadcaster land use, zoning and building code applications "as they come in." NAB Comments at 16.

This, of course, is just a euphemistic way of saying that the proposed rule would "force[] state [and local] governments to absorb the financial burden of implementing a federal regulatory program" by compelling them to devote additional staff and funds

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[13] Printz v. United States, 117 S. Ct. 2365, 2382 n.15 (1997).

[14] See comments cited in note 8 supra.

[15] See, e.g., Philadelphia Comments at 11-33; Jefferson County Comments at 9; CCO Comments at 38-40.

to rushing through broadcaster (and only broadcaster) requests in the (likely vain) attempt to meet the unrealistic deadlines the proposed rules would impose them. Printz, 117 S. ct. at 2382. As the Supreme Court held in Printz, such federal "commandeering" of the executive branches of state and local governments is unconstitutional. Id. at 2374.

Broadcaster comments likewise leave no doubt that the proposed rule would be a comprehensive federal program regulating state and local governments of the type struck down in Printz and New York v. United States, 112 S. Ct. 2408 (1992). What industry seeks -- and what the proposed rules would create -- is a "uniform national policy regarding resolution of zoning and land use disputes."[16] But such a scheme would clearly run afoul of "the Constitution's guarantees of federalism, including the Tenth Amendment." Printz, 117 S. Ct. at 2382. n.15.

C. The Proposed Rules Are Contrary to Other Federal Laws and Policies.

In addition to the proposed rule's constitutional and Communications Act defects, commenters also pointed out that it contravenes other provisions of federal law and policy as well. Thus, aviation industry and airport authority commenters cogently

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[16] NAB Comments at ii. Accord id. at 9 (a "single national framework for tower and broadcast facility construction"); APTS/PBS Comments at 5 ("mere uncertainty of whether [local] approval will be obtained and, if so, subject to what conditions" is a problem deserving of uniform national standards); Comments of N. Carolina Broadcasters et al. at 6 ("no elected public official" apparently can be trusted to make a decision; only unelected FCC can); American Radio Relay League Comments at 5 ("a comprehensive policy on land use preemption to accommodate communications facilities" is needed).

argued that the proposed rule is inconsistent with (1) 49 U.S.C. § 47107(a)(9)-(10) (which requires recipients of federal airport grants to take appropriate action, including the adoption of land use and zoning laws, to restrict land use near airports); and (2) FAA regulations concerning obstructions to navigable airspace, 14 CFR §§ 77.1 et seq. (under which the FAA does not exercise enforcement power but instead relies on state and local land use, zoning and airspace obstruction laws).[17]

Another commenter pointed out that any effort to adopt the rules proposed by the NPRM would violate the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., unless the Commission first conducts an environmental impact statement analysis. CCO Comments at 24-29. Moreover, industry commenters serve only to magnify the environmental concerns posed by the proposed rule, since preemption of all state and local environmental laws relating to broadcast facilities seems to be one of broadcasters' major goals.[18] Given the breadth of the proposed rule, the outcome of any environmental impact analysis would be a foregone conclusion: By giving broadcasters an FCC

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[17] See, e.g., AOPA Comments at 3-4; KAZC Comments at 1-2; Wyoming DOT Comments; Experimental Aircraft Assn. Comments; Ala. Dept. of Aeronautics Comments; Airports Council Inter'l Comments at 2-3 & nn. 3&4; Mass. Aeronautics Comm'n Comments; Air Transport Assn. Comments at 2-5; National Business Aviation Ass'n Comments at 4-6.

[18] See, e.g., Comments of Calif. Broadcasters et al. at 11 & Exh. A (seeking revision to proposed rule to preempt all state and local decisions based on environmental issues); Fant Broadcasting Comments at 1-2 (complaining about New York environmental law).

license to build facilities wherever and whenever they want regardless of environmental impact, the proposed rule reflects no balancing at all but rather would completely subordinate environmental concerns to the pecuniary interests of the broadcast industry.

II. INDUSTRY COMMENTS SUCCEED ONLY IN UNDERSCORING THE GROSSLY OVERREACHING AND IMPERMISSIBLE SWEEP OF THE PROPOSED RULES.

Obviously perceiving in the NPRM an opportunity to insulate themselves from the requirements of state and local land use, zoning, building code, environmental, eminent domain, property, public notice and public hearing laws with which everyone else must comply, broadcasters leap to the defense of the proposed rules. But in their zeal to obtain such blatant federal favoritism, broadcasters overstate, mislead, distort and in the end, manage only to lay bare the fundamentally misguided nature of the proposed rules.

A. Broadcaster Comments Make Plain That What Industry Wants Is To Convert The FCC Not Only Into A National Zoning Board, But Also A National Political Ethics Oversight Board, A National Environmental and Historic Preservation Board, A National Construction Contractor Certification Board, and A National Eminent Domain and Property Rights Review Board for the Special Benefit of the Broadcast Industry.

The preemption of state and local law that the broadcast industry seeks is truly breathtaking in scope. Although much like Humpty Dumpty,[19] industry repeatedly characterizes the

[19] "'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean -- neither more nor less.'" Lewis Carroll, Through the Looking-Glass, ch. 6

preemption it seeks as "narrow" or "limited"[20] and purports to recognize that local "[z]oning authorities have a perfect right, even an obligation, to impose reasonable standards on broadcast and telecommunications facilities,"[21] these palliatives are belied by what industry seeks. NAB, for instance, candidly admits (at ii & 9) that the NPRM rules it authored are nothing short of a "uniform national policy regarding resolution of zoning and land use disputes" and "a single national framework for tower and broadcast facility construction."[22] Similarly, the American Radio Relay League (at 5) wants "a comprehensive policy on land use preemption to accommodate communications facilities." APTS/PBS (at 5) apparently wants the Commission to eliminate all "uncertainty of whether [local] approval will be obtained and, if so, subject to what conditions,"[23] while the North Carolina Broadcasters Association et al. (at 2) apparently believes the Commission should sweep away the "patchwork" of differing state

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at 106-09 (Shocken Books 1987) (1872).

[20] NAB Comments at 1 & 5.

[21] Beaverkettle Comments at 3. See also ALTV Comments at 3; N.J. Broadcasters Comments at 3. Comments of Calif. Broadcasters et al. at 4; APTS/PBS Comments at 1.

[22] See also id. at 6 (NAB's proposed rule is aimed at preempting a "myriad of potential impermissible state and local actions").

[23] See also New York Times Counts at 4 & attached Declaration (complaining that local counsel cannot guarantee variance will be granted on terms and within time period broadcaster wants); Golden Orange Comments at 1-2 ("whatever the merits" of local land use and zoning requirements, they must fall before the almighty goal of DTV).

and local land use requirements. And throughout industry comments, there is also a recurring -- and remarkably undemocratic -- theme that local elected public officials cannot be trusted because they might be influenced by an "emotionally charged" public, and thus an unelected Commission in far-off Washington should dictate local land use decisions concerning broadcast facilities.[24]

Some broadcasters attempt to camouflage the impact of the preemption they seek by asserting that they will of course be "judicious in site selection" because they will not want "to poke local authorities in the eye with provocative land use proposals, while attempting to hide behind the cloak of federal preemption."[25] But this is just another way of making the remarkably arrogant claim that broadcasters should be entitled to a special exemption from local land use and zoning requirements because they -- apparently unlike any other local business subject to land use and zoning laws -- are so wonderful that they can be trusted to regulate themselves. Moreover, if broadcasters truly do not wish to "alienate" the local community and are so certain that their site selections will be "judicious," the obvious question is: Why do they support the proposed rules,

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[24] See, e.g., New Jersey Broadcasters Comments at 2; N. Carolina Broadcasters, et al. Comments at 6.

[25] ALTV Comments at 6-7. Accord South Carolina Broadcasters Comments at 4 (it would be "foolhardy" for broadcaster to propose tower construction that would have adverse impact on community).

which clearly would allow them to "poke local authorities in the eye" and "hide behind the cloak of federal preemption"?

In fact, industry comments make plain that broadcasters want the Commission to become even more than a national zoning board. Thus, one broadcaster complains about an alleged incident of misconduct by a local elected official,[26] apparently believing that the Commission should serve as some sort of political ethics oversight board. Another broadcaster complains about delays resulting from its decision to select tower construction contractors that were not licensed in the states where tower construction was to take place,[27] apparently believing that the Commission should preempt state construction contractor licensing laws and become a national construction contractor certification board.

Still other industry commenters, wanting the Commission to preempt any state or local regulation of broadcast facilities based on aesthetic or environmental concerns, apparently seek to transform the Commission into a national beautification, environmental, historic preservation and wildlife board especially for broadcasters.[28] And some broadcasters, whining about local landowners that choose not to lease land to them for tower sites and developers who allegedly threaten them under

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[26] See WVCH Comments at 3 (asserting that township zoning board chairman sought $40,000 donation).

[27] New Mexico Broadcasting Comments at 3.

[28] See e.g., Comments of Calif. Broadcasters et al. at 11 & Exh. A; NAB Comments at 14-15.

state enterprise zone and eminent domain laws, apparently believe the Commission also should take on the mantle of a national review board of private property rights and eminent domain laws for the special benefit of broadcasters.[29]

This industry feeding frenzy at the prospect of the broad preemption proposed in the NPRM simply underscores the incredible reach of the proposed rules. It also starkly reveals the broad scope of important state and local governmental interests that the proposed rules would displace, as well as the utter futility of any effort by the Commission to fill the vacuum that would be created.

B. The Anecdotes Broadcasters Offer In An Effort To Justify The Proposed Rules Are For the Most Part Inapt and, in Any Event, Certainly Offer No Reasoned Basis For the Sweeping Rules Proposed.

In an effort to justify the rules proposed in the NPRM, some industry commenters attempt to supply examples of problems that they claim are caused by state and local governments. As an initial matter, the Commission should take broadcasters' one-sided descriptions of these events with a healthy dose of salt. Indeed, the record already reveals that, with respect to at least

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[29] See Goetz Broadcasting Comments at 1-3 (complaining about landowners who refused to lease sites due to public opposition); Norman Broadcasting Comments (complaining about supposed threat from adjoining developer to invoke state eminent domain law); Radio Property Ventures Comments at 3 (same).

two of the only five examples given in NAB's original petition, NAB's description of events was misleadingly incomplete.[30]

Moreover, many of the so-called examples of problems about which broadcasters complain either have nothing to do with local zoning or building code laws, or involve circumstances about which the Commission can (and should) do nothing. Thus, some broadcasters complain about refusals by private[31] or public[32] landowners to lease sites to them. Another broadcaster takes umbrage that anyone dared to file an opposition to its FCC CP application and to file objections with the FAA concerning a no-hazard determination.[33] Still other broadcasters believe they are entitled to federal immunity from state enterprise zone and eminent domain laws.[34] Another broadcaster complains that it even had to be bothered to appear before a city council at all, apparently believing itself entitled to the unique privilege of never having to appear and inform a local legislative body of its objections to a legislative proposal.[35] Yet another broadcaster

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[30] Compare NAB Petition at 10-11 (description of Sutro Tower situation) with San Francisco Comments & Attached Declarations (description of Sutro Tower situation); compare NAB Petition at 12 (description of Jefferson County, Colorado situation) with Jefferson County Comments at 5-7 (same).

[31] E.g., Goetz Broadcasting Comments at 1-3.

[32] E.g., Lee Broadcast Comments at 1-2 (landowner is State of Hawaii).

[33] Pappas Comments at 2-4.

[34] See Norman Broadcasting Comments & Radio Property Ventures Comments.

[35] KGUN Comments.

is apparently disturbed about delays due to local public notice and hearing requirements, apparently preferring they did not exist.[36] And still another broadcaster complains that the contractor it hired to build a tower had to obtain a state license to do construction work in the state where the tower was to be built.[37]

Other broadcaster complaints are directed at state environmental protection, historic preservation and aviation safety laws.[38] Finally, some broadcasters complaint not about state or local actions at all, but about delays allegedly caused by other federal agencies, including the FAA, the Bureau of Land Management and the U.S. Forest Service.[39]

Even among those relatively few broadcasters that do purport to provide examples about supposed problems with local government zoning and building code requirements, some of the examples certainly do not support any preemption. Perhaps the most glaring example is Susquehanna Radio, which complains (at 3)

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[36] New York Times Broadcasting Comments, Huckaby Decl. at ¶¶ 10-12 (objecting to delay of public notice and hearing requirements).

[37] New Mexico Broadcasting Comments at 3.

[38] See, e.g., Champlain Valley Telecasting Comments (Vermont environmental law); Fant Broadcasting Comments (New York's SEQRA law); Children's Broadcasting Comments (Calif. environmental law); Pappas Comments at 2-3 (Wisconsin DOT); Cosmos Broadcasting Comments at 2 & Attach. (Ky. Historic Preservation Office and Kentucky Airport Zoning Commission).

[39] E.g., Golden Orange Comments (BLM); New Mexico Broadcasting Comment at 2 (Forest Service); Pappas Comments at 2-4 (FAA); Cosmos Broadcasting at 3 (FAA).